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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. ROBERT ELWOOD FLOYD et al., Defendants and Appellants.	B284321 (Los Angeles County Super. Ct. No. YA093700)

APPEALS from a judgment of the Superior Court of Los Angeles County, Curtis B. Rappé, Judge. Affirmed and remanded with directions.

Verna Wefald, under appointment by the Court of Appeal, for Defendant and Appellant Floyd.

Neil Rosenbaum, under appointment by the Court of Appeal, for Defendant and Appellant Augustine.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant

Attorney General, David E. Madeo, Noah P. Hill, and Pamela C. Hamanaka, Deputy Attorneys General, for Plaintiff and Respondent.

Robert Elwood Floyd and Christopher Lucie Augustine were tried together on numerous charges stemming from a robbery spree of South Los Angeles businesses over several months. Floyd was tried on 18 counts and Augustine on six. Floyd appeals from his judgment of conviction of 10 counts of second degree robbery (Pen. Code, § 211)[1] and two counts of attempted robbery (§§ 211, 664). Augustine appeals from his judgment of conviction of four counts of second degree robbery and two counts of attempted robbery.

Augustine contends the trial court committed prejudicial error by failing to exclude at trial his statements obtained in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct.1602, 16 L.Ed.2d 694] (*Miranda*). However, Augustine waived any objection.

Both Augustine and Floyd contend the court erroneously denied their motions to sever their trials: they argue they should not have been tried together, and Floyd contends the court should have split his 18 counts into five separate trials. We find neither defendant was prejudiced by the joint trial of all counts, and the court's rulings denying their severance motions were proper.

Floyd further argues the court erred in denying his post-verdict motion to disclose the jurors' contact information so that

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[1] All undesignated references to code provisions are to the Penal Code.

Floyd could prepare a motion for new trial. The court did not abuse its discretion in finding Floyd failed to show good cause for such disclosure.

Augustine contends the court committed an error at sentencing by failing to state its reasons for imposing consecutive rather than concurrent sentences for his counts. Any such error was harmless, in that the court's comments during sentencing and the numerous aggravating factors cited by the prosecutor demonstrate it is not reasonably probable the court would impose concurrent sentences were we to remand the matter for resentencing.

Floyd asserts the court made several errors in sentencing him to a total of 447 years to life in prison under the three strikes law. The court did not abuse its discretion by denying his motion to strike his two prior strike convictions pursuant to *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 (*Romero*). Floyd also fails to show the court was unaware it had discretion to impose concurrent rather than consecutive sentences for multiple robbery counts committed on the same occasion. In addition, Floyd's contention that his sentence constitutes cruel and unusual punishment has no merit.

Remand for resentencing is necessary as to Floyd's case, however, to allow the trial court to exercise its discretion under new law, effective January 1, 2019, to strike or dismiss the prior serious felony conviction enhancements the court imposed pursuant to section 667, subdivision (a)(1). We affirm the convictions and, as to Floyd only, remand the matter with directions.

PROCEDURAL AND FACTUAL BACKGROUND

A. *The Information and Pertinent Pretrial Motions*

On July 15, 2016, the Los Angeles County District Attorney filed an 18-count information against Floyd and Augustine[2] stemming from a robbery spree primarily of South Los Angeles auto parts stores from December 15, 2015 to February 2, 2016. Floyd and Augustine were jointly charged in four counts of robbery (§ 211; counts 11, 12, 15 and 16) and two counts of attempted robbery (§§ 211, 664; counts 9 and 10). Floyd was charged with 12 additional counts of robbery (counts 1 to 8, 13, 14, 17 and 18). As to counts 1, 2, 6, 7, 8, 13, 14, 15 and 16, it was further alleged that a principal was armed with a handgun (§ 12022, subd. (a)(1)). It was further alleged as to all Floyd's counts that he had served four prior prison terms for felonies (§ 667.5, subd. (b)) and had suffered two prior serious felonies (§ 667, subd. (a)) and two prior serious and/or violent felonies under the Three Strikes law (§ 667, subds. (a)(1), (b)-(j)).

Both Floyd and Augustine moved to be tried separately from each other, and Floyd moved to have various counts against him tried separately, but the trial court denied the severance motions.

B. *Pertinent Prosecution Evidence at Trial*

1. *Robbery on December 15, 2015 – counts 1 and 2 (Floyd)*

The first robbery occurred at an AutoZone store in Hawthorne on December 15, 2015. At 8:58 p.m., two minutes before closing time, a man entered and asked the employee about

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[2] A third defendant, Brandon Lydalle Flowers, was also charged in the information but was not tried with Floyd and Augustine.

brake pads, with a second man entering shortly after the first and joining the conversation. One of the men then pointed a gun at the employee, and the men forced him to open the cash registers and the safe at the back of the store. The men fled after taking money from the registers and the safe.

Before the man pulled out the gun, a third man wearing a construction vest had tried to enter the store but the entrance was already locked. The employee could not identify anything about this third man other than that he was wearing a construction vest, and he was a "tall-ish" African-American man. The store had a surveillance system that recorded video footage of a man in an orange construction vest attempting to enter the store after the other two men were inside. The video, which did not present a good view of the man in the vest, was played for the jury. At the close of the prosecution's case, the court granted the defense motion to dismiss for insufficient evidence the counts involving this robbery (counts 1 and 2).

2. *December 17, 2015 robbery – counts 6, 7 and 8 (Floyd)*

Carolina Gomez and William Vinegar were working at an AutoZone store in Gardena the night of December 17, 2015. At around 9:15 p.m., 45 minutes before closing time, three men entered the store. They were all wearing sunglasses and either hoods or hats. One wore a black hoodie and the second wore a white t-shirt. The third man was wearing a reflective construction vest and a baseball hat. Thinking the men seemed suspicious, Gomez went to the back office to call 911.

The man wearing the construction vest asked Vinegar about some brakes, and when Vinegar turned to look for the part, the man grabbed him from behind. He told Vinegar, "I don't

want to hurt you." Vinegar felt something against his back that he thought was a gun.

Gomez heard the commotion and saw the men had Vinegar in a chokehold. The men told Gomez and her boyfriend (who was waiting for her in the back) to get down on the floor. The men pushed Vinegar and yelled at him to open the safe. Vinegar opened the safe, and the man in the white shirt began removing money from it.

The man in the black hoodie pointed a gun at Gomez and her boyfriend as they lay on the floor. The man in the construction vest told Gomez to get up and not to do anything stupid. He walked her out to the registers, and she opened them. He then led her back to the office and told her to get back down on the floor. The three men then fled with the money and Gomez's boyfriend's wallet.

At trial, Gomez identified Floyd as the man who had been wearing the construction vest. On February 3, 2016, Gomez had also identified Floyd from a six-pack photographic lineup. She recognized his facial hair and the shape of his face. At trial, Gomez testified she was 70 percent sure that the man she identified in the photographic lineup depicted the robber who was wearing the construction vest. Gomez had also identified Floyd at the preliminary hearing as the robber who was wearing the vest.

A surveillance video capturing the robbery and still photographs from that video were shown to the jury. A stocky African-American man with facial hair and wearing an orange construction vest, a baseball hat and sunglasses was visible in the video, and Gomez again pointed out Floyd as the man on the video who was wearing the vest.

3. *December 19, 2015 robbery – counts 11 and 12 (Floyd and Augustine)*

Michael Flores testified that he was working at the AutoZone in Inglewood on the night of December 19, 2015. At approximately 8:45 p.m., near the store's closing time, an African-American man with a clean-cut beard, wearing a construction vest and a black beanie, approached him in the store and asked about brakes for a particular make and model of car. After some discussion, Flores went to retrieve some brakes from the back of the store. The man snuck up behind him and grabbed his shirt. The man demanded Flores take him to the safe and then ordered Flores and his coworker, who was also present, to open it. The man became impatient with how long it was taking to open the safe and told Flores's coworker that if the safe did not open he was going to blow the coworker's brains out. Flores did not see a gun.

After the employees succeeded in opening the safe, two other men entered the office and removed the money that was in the safe. Flores was not able to see these two other men's faces or tell their ethnicity because they were wearing zipped-up hoodies. The man wearing the construction vest took Flores's wallet, looked at his home address, and told him that if he called the police or said anything the man knew where Flores lived.

Flores testified about a prior identification of the man in the construction vest that he made from a six-pack photographic lineup. Flores had picked the photograph of Floyd, telling the police, "That's the guy that grabbed me, looks like him, just a little darker." At trial, Flores testified he circled the photograph of a person who "kind of looked like" the person in the construction vest. He further testified he did not see the man

depicted in that photograph in the courtroom. Flores also said he did not see the other perpetrators in the courtroom, and reiterated he was not able to get a good look at the other two.

Surveillance video footage and still shots of the robbery were shown to the jury. They showed an African-American man with a stocky build and facial hair wearing an orange construction vest with reflective stripes and a black beanie. The video and still photographs also depicted another African-American man with facial hair who was wearing grey gloves as well as a red hoodie with black sleeves, a black pouch, and a small Nike Jordan brand "Jumpman" logo on the left chest area.

4. *December 30, 2015 robbery – counts 17 and 18 (Floyd)*

The fourth robbery occurred at the O'Reilly Auto Parts store in Inglewood on December 30, 2015. One of the employees working that night, Roberto Palacios, testified that a man entered the store at approximately 8:00 p.m. This man was a tall African-American man wearing an orange construction vest, a white construction helmet, blue pants and construction boots.

The man in the construction vest spent 10 minutes picking out parts. He then left his basket and exited the store, only to return 20-25 minutes later, at which time he engaged in at least 30 minutes of conversation with Palacios about parts, including brake pads.

Another man entered the store near the 9:00 p.m. closing time. Soon after, the man in the construction vest said, "You know what's going to happen next," and proceeded to hit Palacios's coworker. Palacios was hit in the head from behind by the other man. Palacios was unconscious for approximately 30 seconds, and when he regained consciousness, he was in the office on his knees. The man in the construction vest dragged

him by his collar over to the safe and told him to open it. Palacios "told him no at first and then he told me you better open it or I'm going to fucking kill you." Palacios told the man in the construction vest it would take him 10 minutes to open it, but the man said, "[N]o, it's going to take five. Either open it right now or I'm going to kill you."

Apparently not wanting to wait any longer for Palacios to get the safe open, the man wearing the construction vest dragged Palacios and his coworker to the front of the store and told them to lie down on their stomachs. During this time, Palacios looked up and saw the other man dressed in black pulling the money out of the drawers. The man in the construction vest threatened to kill Palacios if he raised his head again. The men left with the money, as well as a stereo and some brake pads, screaming, "Happy New Year, Motherfuckers."

Approximately four or five months later, Palacios identified Floyd in a six-pack photographic lineup as the man wearing a construction vest. Palacios did not make any in-court identification at the preliminary hearing a year before trial. During the trial, Palacios testified he did not see in court the man who had been wearing the construction vest. However, he identified Augustine (who was not charged in these counts) as the man who had struck him in the back of the head. There was no surveillance footage from this robbery.

Palacios testified he wrote down the part numbers for the brake pads for a 2013 Ford F-150 that were taken from the store. The police found brake pads with the same part numbers in Floyd's car one month later.

5. *January 7, 2016 robbery – counts 15 and 16* (*Floyd and Augustine)*

Guillermo Tapia testified he was working at an AutoZone store located in South Los Angeles on the night of January 7, 2016. At around the 9:00 p.m. store closing time, a customer was still in the store. The door had been locked, but at approximately 9:05 p.m. the man said he needed to get his wallet outside. Tapia let him out and at the same time a second man, dressed in a grey Jordan jumpsuit and a hat, requested to be let in to buy some windshield wipers. The second man in grey came in, went to the wiper aisle, and then came to the counter asking for help finding a particular size. Tapia's coworker Anthony Carrillo helped him at the counter.

The first man came back to the store entrance holding his wallet and asked to be let in to pay for the parts. He was dressed in red and wearing one glove. He was let in, and while Tapia was ringing him up at the register, the second man in grey grabbed Carrillo in a bear hug and took him to the back office. Tapia tried to leave the store, but the first man in red grabbed him by the arm and took him to the back also. The men ordered Tapia to open the safe in the office and took Carrillo to the front to open the registers. When Tapia punched in the wrong code to the safe, the man in red raised his fist in a threatening manner. Once Tapia got the safe open, the man in red told him to lie on the ground and then grabbed all the money. The man in red asked Tapia for his keys and his phone and then ran out, leaving Tapia's phone on the counter.

In a photographic lineup that took place approximately one month after the robbery, Tapia identified Augustine as the man in red and Floyd as the man in grey. Tapia failed to identify

either of the two men at the preliminary hearing. At trial, Tapia identified Augustine as the man who was wearing the red sweatshirt and Floyd as the man who was wearing grey.

Tapia acknowledged that the man wearing grey had his head and part of his face covered by his hood during the robbery, and Tapia was able to see only from the top of the nose to around the eyebrows. Tapia had spoken to the man in grey briefly at the register and was able to partially view his face for approximately five seconds. Tapia stated he got a better facial view of the man in the red sweatshirt because he spent more time talking to him at the register.

Tapia's coworker Carrillo also testified about the robbery. At approximately 9:00 p.m., Carrillo pointed out to Tapia that a customer had been browsing for longer than usual. Tapia began assisting that person, who was wearing a red shirt and black pants. Another man, dressed in a grey jumpsuit with a hoodie, came in asking for wipers, and Carrillo assisted him. Carrillo and the man in grey discussed brake pads for five to eight minutes, until the man grabbed the front of his shirt, took him to the back, and told him to show him the safe. Carrillo told him he had no way of opening the safe, and then the man in red took Tapia to the safe, and the man in grey had Carrillo open the registers.

Carrillo testified the man in red was African-American, "maybe 6'8" tall," and approximately 220 pounds. The man in grey was African-American with a light goatee. He was approximately 6 feet 4 inches tall and at least 260 pounds. When initially speaking to the police, Carrillo had described both men as being approximately six feet tall.

The parties stipulated that on February 3, 2016 Carrillo viewed a six-pack photographic lineup that included Augustine's photograph, and Carrillo made no identification of Augustine. However, Carrillo had identified Floyd as the man in grey. Although the man in grey had the top of his head covered by a hoodie, Carrillo could see his full face for the five to eight minutes that they were talking.

At trial, Carrillo identified Augustine as the man wearing red. He did not identify Floyd.

The jury viewed surveillance video showing several camera angles of both robbers as well as still shots of the robber in red. The first man in red was African-American and had facial hair. He wore his hoodie over his head. Like the robber in the December 17, 2015 robbery, he was wearing grey gloves and a red hoodie with black sleeves, a black pouch, and a Jumpman logo on the left chest. He was also wearing black pants and black and red sneakers with white bottoms. The second man, who was also African-American and appeared to be stockier than the man in red, was wearing an all-grey sweatsuit with his hoodie on, grey gloves, and black sneakers with a white Nike swoosh that extended to the top of the shoes.

6. *January 19, 2016 robbery – counts 3 and 4 (Floyd)*

Sergio Rosales and Monica Castillo were working at the AutoZone in Hawthorne on January 19, 2016. Just before the 9:00 p.m. closing time, an African-American man wearing a reflective yellow vest and a white construction hard hat came into the store. The man in the vest made a nonsensical request for parts to Castillo. At the same time, another African-American man in a hoodie and wearing all black entered the store and approached Rosales. When Rosales turned around, the man

wearing black grabbed him and pushed him towards the counter, telling him to open up the cash registers, which Rosales did. At the same time, the man in the construction vest pulled Castillo towards the back and told her to open the safe. He stuffed money from the safe into his pants.

On February 3, 2016, both Castillo and Rosales selected Floyd's photograph in the six-pack photographic lineup as the man in the construction vest. At trial, Castillo was not able to identify Floyd. Rosales identified Augustine as the man wearing the vest (but Augustine was not charged in the count).

Video and still shots from the store surveillance system showed the two men, including one wearing an orange construction vest and a white hard hat with logos on it. The orange construction vest looked like the one worn by the robber in the December 17 and December 19 robberies who had a similar stocky build.

7. *January 27, 2015 storage company robbery – count 5 (Floyd)*

The next robbery took place on January 27, 2015, at a storage company on Jefferson Boulevard in Culver City. At approximately 12:45 p.m., a tall African-American man wearing an orange construction vest and a construction hat entered the business. The sole employee on duty described the man as six feet tall or more and approximately 250 to 260 pounds, with a short beard.

After another customer left, the man approached the employee who was behind the counter. He inquired about renting a unit and laid a few pieces of merchandise on the counter. When the employee asked for his identification, the man stated he forgot it in his truck and walked towards the door. He

then turned around and came around the counter, pushed the employee down to the ground, and started going through the register. Then he forced her to get up and open the safe for him. After the man looked through the safe he told the employee to go behind the counter again, and then he left.

At trial, the employee identified Floyd as the man who robbed the store. The employee had also identified Floyd from a six-pack photographic lineup one week after the robbery, and she had again identified him at the preliminary hearing.

Video and still shots from security camera footage were shown to the jury and provided clear views of the robber and his orange construction vest and white construction hard hat with logos. The man had a similar build to the man who wore a construction vest to commit the earlier offenses; the vest looked like the one worn by the robber in the other robberies; and the white construction hat appeared to bear logos like the one on the hat worn by the robber in the January 19 robbery.

Surveillance video footage from a neighboring business captured a black vehicle coming through an alley from the direction of Jefferson Boulevard just after the robbery. Floyd was later determined to be the owner of a similar-looking black vehicle, with the same distinctive grill on the side that is evident in the surveillance footage.

8. *January 27, 2016 AutoZone robbery – counts 13 and 14 (Floyd)*

Another robbery was committed later that same day, at an AutoZone store in South Los Angeles. That location was open 24 hours a day, and at 11:00 p.m., a customer wearing a construction vest and a hard hat came up to one of the employees and asked him to look up a part for him. After the employee

looked up the part and gave him the information, the man reached into his vest, pulled out a gun and pointed it at the employee. The man told the employee to follow him to the back of the store. On the way, the man pointed his gun at the employee's coworker, then grabbed her and pointed the gun at both of them. Once in the back office, he forced the employee to open the safe. The man took most of the money in the safe and stuffed it into a bag. Then the man in the vest noticed a third employee sweeping the floor, and ordered that employee to get down on the floor in the office. He took money from the registers and then left the store. The jury viewed surveillance camera video and still shots, in which the robber was shown wearing an orange construction vest, a white hard hat with logos around it, and black sneakers with a white Nike swoosh that extended to the top of the shoes. The vest looked like the one in the footage of the earlier robberies, and the hat bore similar-looking logos. In addition, the black shoes with the white swoosh looked like those worn by the robber during the January 7 offense.

The employee described the robber as African-American, approximately 190 to 200 pounds, and approximately 5 feet 9 or 10 inches tall. The employee did not get a good look at the man's face. At trial, he was not able to identify Floyd as the man who had been wearing the vest, and he had identified someone else from the six-pack photographic lineup.

9. *February 2, 2016 attempted robbery – counts 9 and 10 (Floyd and Augustine)*

On February 2, 2016, Vinegar, who had already been the victim of the AutoZone robbery on December 17, 2015, was working at the same AutoZone store in Gardena. Just before the 10:00 p.m. closing time, at 9:48 p.m., he went outside to do the

perimeter check required since the earlier robbery. He noticed a man walking across the parking lot. When Vinegar went back into the store, the man entered the store right behind him. The man said he was looking for brakes for a Nissan Maxima. Vinegar thought it strange that the man apparently had not come in a car. The man was also acting nervous and hesitant. Vinegar became suspicious and told the man he would go look for the brakes. While he was in the back pretending to look for the brakes, he saw another man come in wearing a reflective vest and a hat.

When Vinegar saw the man in the construction vest and hard hat, the man and his vest looked familiar and Vinegar thought, "It's going down again." He believed the men were going to rob the store. Vinegar thought about the fact that the man had the same height and build as the person who was wearing the construction vest during the first robbery, and the man was walking into the store late at night. He thought it was odd that the man was wearing the construction vest and hat when it was nighttime and there were no freeways nearby. Like the first man, the man in the vest was also asking about brakes, which Vinegar thought was suspicious.

Vinegar called 911 and said he thought the store was about to be robbed. He then stalled the men until officers from the Gardena police department showed up with guns drawn.

The police detained both men. Augustine told one of the officers, Brian Park, that he had come by car and nodded in the direction of the car. Officer Park found the car, a black Dodge Nitro, which was parked off-site despite the AutoZone parking lot being empty. Officer Park looked inside the car "to check for bodies or people." The empty car was running with the key in the

ignition and the doors unlocked. The car was impounded and subsequently searched. In the back of the car, which was registered to Floyd, the police found some brake pads that were determined to be brake pads stolen during the December 30, 2015 robbery. In the car the police also found a wallet containing Floyd's identification card and a debit card, and another wallet containing a debit card with Augustine's name on it.

The prosecution introduced photographs of Floyd and Augustine taken after their arrests that evening. Floyd was wearing an orange construction vest, black shoes with a white Nike swoosh that wrapped around to the top of the shoe, and a white hard hat with logos on the front and back. The vest, hard hat, and shoes all looked similar to those accessories worn by the robber in other recent robberies of auto parts stores.

Augustine was wearing a red hoodie with black sleeves and a black pouch, and a "Jumpman" logo on the left chest area. The hoodie looked like the one worn by one of the robbers in the offenses committed on December 19, 2015 and January 7, 2016. Augustine was also wearing black and red sneakers with red laces and white bottoms that looked like the ones worn by the robber on January 7, 2016. Further, he was wearing grey gloves that looked like those worn by the robber on December 19, 2015 and January 7, 2016.

C. *Defense Evidence*

Neither Floyd nor Augustine testified. Defense expert witness, Dr. Kathy Pezdek, testified about the frequency of incorrect eyewitness identifications and the factors relating to the accuracy of eyewitness memory and identification.

D. *Jury Verdicts and Bifurcated Court Trial on Enhancements*

The jury could not reach a verdict as to Floyd on counts 13, 14, 15 and 16. The court declared a mistrial on those charges, which the prosecution then dismissed. The jury found Floyd guilty on counts 3 through 12 and 17 and 18. As to counts 6, 7 and 8, the jury found true the allegation that a principal was armed within the meaning of section 12022, subdivision (a)(1).

In a bifurcated proceeding, Floyd waived his right to a jury trial on the prior conviction and prior prison term allegations. Following a court trial, the court found true each of those allegations.

The jury found Augustine guilty on counts 9 through 12 and 15 and 16.

E. *Sentencing*

At the sentencing hearing, the court denied Floyd's *Romero* motion to strike his prior convictions. The court sentenced Floyd to consecutive sentences on each of the 12 counts and each enhancement, for a total sentence of 447 years to life: the court sentenced Floyd as a third strike offender to 25 years to life on each of the 12 counts; plus 120 years for the two five-year enhancements (§ 667, subd. (a)(1)) imposed on each of those 12 indeterminate counts; plus 24 years for the two prison priors that were not stayed as to each count (§ 667.5, subd. (b)), as well as one year for each of the firearm-use enhancements as to counts 6, 7 and 8 (§ 12022, subd. (a)(1)).

In sentencing Augustine, the court imposed consecutive sentences on each count for a total sentence of nine years four months in prison: the court imposed the upper term of five years on count 11 (the base count); one-third of the middle

term on counts 12, 15 and 16 for an additional three years; and one-third of the middle term on counts 9 and 10 for an additional one year and four months.

Floyd and Augustine each timely appealed.

DISCUSSION

I. *Augustine Waived Any* Miranda *Objection*

Augustine asserts the trial court committed prejudicial error by admitting evidence obtained in violation of his *Miranda* rights, and thus we should reverse the judgment as to counts 9 and 10 regarding the attempted robbery on February 2, 2016. Specifically, he contends he was already in custody and had not been informed of his *Miranda* rights when, on the evening of February 2, 2016, Officer Park asked Augustine how he arrived at the AutoZone store, and Augustine responded that he had arrived by car and used a nod of his head to indicate the general area where the car was parked. Augustine contends that not only should the court have excluded these statements, but also, under the "fruit of the poisonous tree" doctrine, it should have excluded evidence that the police then found the car off-site with its engine running and doors unlocked, with both Augustine's and Floyd's wallets located inside. Augustine contends that without this information, the admissible evidence was insufficient to convict him of attempted robbery on February 2, 2016 (counts 9 and 10).

At a hearing conducted outside the presence of the jury pursuant to Evidence Code section 402, Officer Park testified that he arrived at the AutoZone store on February 2, 2016 in response to an employee's 911 call. He saw Augustine and Floyd inside at the counter talking to two employees and "decided to detain the

subjects . . . pending further investigation." Officer Park ordered the two men to keep their hands where they could be seen and to back up while facing away from the officers. After the men complied and exited the store, the police placed their hands in handcuffs behind their backs. Officer Park placed Augustine in the back of a police vehicle. Officer Park testified the two men were not free to leave at that point as he was trying to gather information from them as part of his investigation. At this juncture, Officer Park asked Augustine how he had come to the store, eliciting Augustine's response about the car.

"A defendant who is in custody . . . must be given *Miranda* warnings before police officers may interrogate him." (*People v. Haley* (2004) 34 Cal.4th 283, 300.) Custodial interrogation means "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." (*Miranda, supra*, 384 U.S. at p. 444; see *People v. Arnold* (1967) 66 Cal.2d 438, 448, disapproved on other grounds in *Walker v. Superior Court* (1988) 47 Cal.3d 112, 123.) To determine whether an individual was in custody, a court examines whether there was a "'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." (*California v. Beheler* (1983) 463 U.S. 1121, 1125 [103 S.Ct. 3517, 77 L.Ed.2d 1275]; see *In re Kenneth S.* (2005) 133 Cal.App.4th 54, 64.) "Factors to consider include whether there has been a formal arrest, the location of the detention, the ratio of officers to the individual, and the demeanor of the officer or officers, among other factors." (*In re M.S.* (2019) 32 Cal.App.5th 1177, 1188.)

"'Clearly, not all conversation between an officer and a suspect constitutes interrogation. The police may speak to a

suspect in custody as long as the speech would not reasonably be construed as calling for an incriminating response.'" (*People v. Haley, supra,* 34 Cal.4th at p. 301.) Moreover, "[a] custodial interrogation does not occur where an officer detains a suspect for investigation and the questioning is limited to the purpose of identifying a suspect or 'to obtain [sufficient] information confirming or dispelling the officer's suspicions.'" (*People v. Davidson* (2013) 221 Cal.App.4th 966, 970, quoting *People v. Farnam* (2002) 28 Cal.4th 107, 180.) "'[B]rief and casual' questioning during a temporary detention" is permissible because the very purpose of a temporary detention is to enable the police to determine "whether they should arrest a suspect and charge him with crime, whether they should investigate further, or whether they should take no action because their initial suspicion proved groundless." (*People v. Davidson,* at p. 971, quoting *Culombe v. Connecticut* (1961) 367 U.S. 568, 571 [81 S.Ct. 1860, 1861-1862, 6 L.Ed.2d 1037, 1040].)

We do not reach the issue whether the police should have given *Miranda* warnings to Augustine prior to questioning him about the car, because he waived any objection to admission of his statements to the police. Before the trial commenced, the prosecution stated its intention to call Officer Park to testify that Augustine told Officer Park he came in a car and then pointed in the direction of the car, which was not visible to Officer Park. In response to the court's question, "Anybody take issue with that?" Augustine's counsel responded, "No," and then stated, "I have no objection on that particular issue for counsel to lead the witness where he can just respond 'Yes.'" The prosecution proceeded accordingly in examining Officer Park:

"Q. Did you have a chance to speak with Mr. Augustine that night?

"A: Yes, I did.

"Q. And did he tell you that he got there by a car and kind of nod in the direction of where that car was?

"A. Yes.

"Q. And . . . did you go searching for a car in that direction?"

"A. Yes, I did.

"Q. And did you eventually find a car?

"A. Yes."

Augustine concedes that his trial counsel waived any objection to the introduction of Augustine's statements based on the absence of a prior *Miranda* warning. Because Augustine waived any objection, he cannot claim error on appeal. (See *People v. Mendez* (2019) 7 Cal.5th 680, 693 [defendant's explicit assent to testimony "makes the record inscrutable" on issue of admissibility of that testimony]; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 81-82 [failure to object to testimony forfeits argument it was inadmissible].)[3]

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[3] Augustine has filed a petition for writ of habeas corpus in which he contends that his trial counsel provided ineffective assistance of counsel by failing to object to the admission of the evidence obtained in violation of his *Miranda* rights. (See B294695.) An order to show cause has been issued contemporaneously with the filing of this opinion.

II. *The Court Did Not Abuse Its Discretion in Denying Floyd's and Augustine's Motions for Severance*

A. *Floyd's Motion To Sever Trials on Various Counts*

Floyd contends the trial court abused its discretion in denying his motion for severance to provide him five separate trials in which the counts would be grouped as follows: (1) counts 1, 2, 3 and 4; (2) count 5; (3) counts 6, 7, 8, 9 and 10; (4) counts 11, 12, 17 and 18; and (5) counts 13, 14, 15 and 16.

Section 954 authorizes joinder of different offenses when they are "connected together in their commission or . . . [are] of the same class of crime or offenses . . . ." "The legislative preference for consolidation under either of the two circumstances set forth in section 954 is intended to promote judicial efficiency." (*People v. Landry* (2016) 2 Cal.5th 52, 75 (*Landry*).) The court has discretion to order that counts be divided into two or more groups for purposes of trial "in the interest of justice and for good cause shown." (§ 954.)

"'Offenses of the same class are offenses which possess common characteristics or attributes.'" (*Landry, supra,* 2 Cal.5th at p. 76.) Here, all the counts were for robbery or attempted robbery and thus were all of the same class. In addition, the offenses were "connected together in their commission": "'[O]ffenses which are committed at different times and places against different victims are nevertheless "connected together in their commission" when they are, as here, linked by a "'common element of substantial importance.'"'" (*Id.* at p. 76.) Floyd does not argue that the various counts were not linked by a common thread; indeed, given the modus operandi common to all the robberies and attempted robberies, any such argument would be futile. The offenses were properly joined under section 954.

"Since the requirements for joinder were satisfied, [Floyd] can predicate error only on a clear showing of potential prejudice. [Citation.] 'The burden is on the party seeking severance to clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried.'" (*People v. Osband* (1996) 13 Cal.4th 622, 666; see *People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 281 (*Gonzales and Soliz*).) "We review a trial court's decision not to sever counts for abuse of discretion based on the record when the motion was heard. [Citation.] But even if a trial court's ruling on a motion to sever is correct at the time it was made, a reviewing court still must determine whether, in the end, the joinder of counts resulted in gross unfairness depriving the defendant of due process of law." (*Gonzales and Soliz*, at p. 281.)

"Refusal to sever may be an abuse of discretion where (1) evidence of the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a 'weak' case has been joined with a 'strong' case or with another 'weak' case, so that the 'spillover' effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges; and (4) any one of the charges carries the death penalty or joinder of them turns the matter into a capital case." (*Gonzales and Soliz, supra*, 52 Cal.4th at p. 282.)

Floyd contends he was prejudiced by the counts involving no gun use being tried along with the counts involving use of a gun. He argues the evidence of gun use likely incited the jury to convict Floyd on weaker counts or counts involving no gun. Floyd also contends that the stronger eyewitness identification as to some of the counts likely affected the jurors' consideration of the

counts for which the evidence of identification was weaker. Floyd, however, fails to carry his burden to clearly establish a substantial danger of prejudice from the single trial on all counts.

"If the evidence is cross-admissible, then this 'is normally sufficient to dispel any suggestion of prejudice and to justify a trial court's refusal to sever properly joined charges.'" (*People v. Gomez* (2018) 6 Cal.5th 243, 275-276 (*Gomez*); see *Gonzales and Soliz, supra*, 52 Cal.4th at p. 282.) The evidence associated with each count of robbery or attempted robbery plainly would have been cross-admissible in separate trials on the various counts pursuant to Evidence Code section 1101, which permits "other crimes" evidence to prove some fact other than criminal propensity, such as identity, intent, motive, or plan.

The evidence of each robbery was admissible as to each other offense to show a common plan by Floyd (sometimes accompanied by Augustine and sometimes by other accomplices) to target businesses in South Los Angeles, including eight auto parts stores and one storage unit store, for the same type of robberies beginning in late 2015. "To be admissible to prove a common plan or scheme, evidence of other misconduct 'must demonstrate "not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations."'" (*Landry, supra*, 2 Cal.5th at p. 78.) Between December 15, 2015 and February 2, 2016, in the eight robberies or attempted robberies of auto parts stores (seven AutoZone stores and one O'Reilly Auto Parts store), Floyd and his accomplices always entered the store near closing time, staggering their entrances. Posing as customers, the men would engage the employees with inquiries about auto parts

(usually brakes) before overpowering them and forcing them to open the cash registers and safes. Floyd typically wore an orange construction vest and hard hat, presumably to look like someone stopping by after a work shift to purchase parts. In the one robbery of the storage unit business, Floyd also posed as a customer and as part of his ruse wore his distinctive "robbery outfit." These various elements were consistent with one common scheme.

Likewise, evidence of each of the robberies was cross-admissible to prove Floyd's identity as one of the robbers. To be admissible to prove identity, the marks common to the offenses must be "sufficiently distinctive that they bear defendant's unique 'signature.'" (*People v. Bean* (1988) 46 Cal.3d 919, 937; see *People v. Scott* (2011) 52 Cal.4th 452, 472 ["[f]or identity to be established, the offenses must share common features that are so distinctive as to support an inference that the same person committed them"].) "The inference of identity . . . need not depend on one or more unique or nearly unique common features; features of substantial but lesser distinctiveness may yield a distinctive combination when considered together." (*People v. Miller* (1990) 50 Cal.3d 954, 987.) The distinctive "robbery outfit" worn by the robber — which Floyd was wearing upon his arrest — along with the confluence of other common features of each of the robberies tended to show that Floyd was the culprit in each offense.

"Even if cross-admissibility alone did not justify the trial court's denial of [Floyd's] severance motion, the balance of the remaining factors does not show that the trial court abused its discretion." (*Gomez, supra*, 6 Cal.5th at p. 276.) Floyd's concern about a prejudicial "spillover" effect is addressed only in

conclusory fashion: he states that some of the counts were supported by weaker evidence of identification, but he does not specify which particular counts or why he believes the supporting evidence was weaker. In any event, "[a] mere imbalance in the evidence . . . will not indicate a risk of prejudicial 'spillover effect,' militating against the benefits of joinder and warranting severance of properly joined charges." [Citation.] Furthermore, the benefits of joinder are not outweighed—and severance is not required—merely because properly joined charges might make it more difficult for a defendant to avoid conviction compared with his or her chances were the charges to be separately tried." (*People v. Soper* (2009) 45 Cal.4th 759, 781.)

Nor has Floyd demonstrated that trying the counts involving use of a gun with those not involving a gun unduly prejudiced him because the evidence of gun use was unusually inflammatory. The use of force in the December 17, 2015 armed robbery was not markedly more extreme than in other counts, which involved the robber identified as Floyd punching one victim's head and threatening to kill several other victims. Further, "'the animating concern underlying this factor is not merely whether evidence from one offense is repulsive,' but ""whether "'strong evidence of a lesser but inflammatory crime might be used to bolster a weak prosecution case' on another crime."" (*Gomez, supra,* 6 Cal.5th at p. 277.) Floyd has not shown that concern was a reasonable one here. And in any event, the fact that the jury deadlocked on counts 13, 14, 15 and 16 dispels the notion that the evidence of gun use during one of the robberies enflamed the passions of the jurors such that they could not render a fair verdict as to each count. Rather, the deadlock demonstrates that the jury carefully assessed the relative

strengths and weaknesses of the evidence particular to each offense.

Floyd has not demonstrated that the trial court's severance ruling was an abuse of discretion when made, or that the single trial on all counts actually resulted in gross unfairness amounting to denial of due process.

B. *The Trial of Floyd and Augustine Together Did Not Result in Undue Prejudice to Either*

Floyd further contends that because he was charged in all 18 counts but Augustine was only charged in six, in the joint trial Floyd "appear[ed] to be the ring leader," which confused the jurors and made it impossible for them to fairly weigh the evidence as to each count on its own merits. For his part, Augustine argues that a joint trial was prejudicial to him "because the much larger and stronger body of evidence against Floyd on many charges of which he was found guilty was bound to influence jurors in evaluating the much smaller corpus of evidence against Augustine." Neither contention has merit.[4]

"The Legislature has established a strong preference for joint trials. [Citation.] Section 1098 states, in relevant part: 'When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order separate trials.' 'Joint trials

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[4] Before trial Augustine also argued he would be prejudiced if jointly tried with Floyd due to the likelihood that Floyd would have outbursts and behave inappropriately before the jurors, as he had done in pretrial appearances. However, on appeal Augustine does not argue this issue and does not dispute the Attorney General's assertion that the record of the trial does not show any inappropriate behavior by Floyd that could have influenced the jury.

are favored because they "promote [economy and] efficiency" and "'serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts.'" (*People v. Winbush* (2017) 2 Cal.5th 402, 455-456.) "'When defendants are charged with having committed "common crimes involving common events and victims," as here, the court is presented with a "'classic case'" for a joint trial.'" (*Id.* at p. 456.) In order to conduct a joint trial involving two defendants, the defendants must both be charged with *at least one* offense arising out of the same single transaction; both defendants need not be named in every count, however. (See *People v. Ortiz* (1978) 22 Cal.3d 38, 43; *People v. Wickliffe* (1986) 183 Cal.App.3d 37, 40-41.)

"We review the denial of a severance motion for abuse of discretion, based on the facts as they appeared at the time of the court's ruling. [Citation.] 'Even if a trial court abuses its discretion in failing to grant severance, reversal is required only upon a showing that, to a reasonable probability, the defendant would have received a more favorable result in a separate trial.'" (*People v. Winbush, supra,* 2 Cal.5th at pp. 455-456.)

"Factors that may bear on a trial court's decision to order separate trials include "'an incriminating confession, prejudicial association with codefendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a separate trial a codefendant would give exonerating testimony.'" Severance may also be appropriate where "'there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.'" (*Gomez, supra,* 6 Cal.5th at p. 274; see *People v. Thompson* (2016) 1 Cal.5th 1043, 1079.) Neither Floyd nor Augustine has

demonstrated that severance of their trials was warranted under the above factors.

Floyd fails to persuade us that he was prejudiced by the joint trial because the jury would perceive him as the ringleader given that he was implicated in all 18 counts while Augustine was only charged in six. The jury deadlocked on counts 15 and 16 as to Floyd while convicting Augustine on the same counts, demonstrating it rendered its verdicts based on its consideration of the evidence, not any unfair considerations.

Augustine contends that the evidence on the eight robberies charged against Floyd alone – counts 3, 4, 5, 6, 7, 8, 17 and 18 – was "substantially stronger than the identification evidence in the December 19 and January 7 robberies with which Augustine was charged (counts 11-12 and 15-16)." By way of support for this argument, he points only to the fact that Anthony Carrillo, one of the AutoZone employees who testified at trial regarding the January 7, 2016 robbery (counts 15 and 16), described the robber in red as 6 feet 8 inches tall, when Augustine is not that tall.

In fact, the evidence identifying Augustine as one of the robbers on both December 19, 2015 and January 7, 2016 was strong. Surveillance footage of both those robberies showed an African-American man with the same build and facial hair as Augustine, wearing the same distinctive red and black "Jumpman" hoodie and grey gloves that he was wearing when he was arrested at another AutoZone store on February 2, 2016. The footage from the January 7, 2016 robbery also shows the robber wearing black and red shoes with red laces and white bottoms that are very similar to the shoes Augustine was wearing when he was arrested for attempted robbery on February 2, 2016.

Although the employee present for the December 19, 2015 robbery was unable to identify Augustine, testifying that he did not get a good look at the robbers, both victims of the January 7, 2016 robbery identified Augustine as one of the robbers that night. Specifically, one of them (Tapia) picked Augustine out of a six-pack photographic lineup one month after the robbery. Tapia testified he got a good look at Augustine because they were face-to-face at the cash register. Tapia told police at the time of the lineup that Augustine's face structure evident in the photograph he picked out was identical to that of the robber wearing red. Although Tapia did not identify Augustine at the preliminary hearing, he identified him in court as the robber who was wearing red.[5] The eyewitness identifications of Augustine, combined with the surveillance video footage from December 19, 2015 and January 7, 2016 and other evidence proffered by the prosecution, provided strong evidence that Augustine was one of the robbers on those two occasions.

Augustine also contends it was prejudicial for the additional counts against Floyd involving the use of a gun or violence against the victims to be tried along with the counts against him, suggesting his own conduct was more benign. His argument ignores the evidence that in the commission of the January 7, 2016 robbery, Augustine grabbed one of the employees and raised a fist at him in a threatening manner when the

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[5] Tapia's coworker Carrillo did not identify Augustine in the photographic lineup, but did identify him at trial as the robber who was wearing red. Unlike Tapia, Carrillo did not deal one on one with the robber wearing red; instead, he assisted (and then was grabbed by) the other man wearing grey.

worker was having trouble opening the safe. The robberies in which Augustine was found to have participated were accomplished by both force and fear and are not appropriately categorized as more benign than Floyd's separate offenses. Augustine has not shown that the jury convicted him on weak counts due to inflammatory evidence involving his co-defendant's conduct. Further, the court instructed the jury that it "must separately consider the evidence as it applies to each defendant. You must decide each charge for each defendant separately." We presume the jury understood and followed that instruction. (*People v. Wilson* (2008) 44 Cal.4th 758, 803.) And based on the jury's deadlock as to Floyd on the counts involving the January 7, 2016 robbery but its guilty verdicts as to Augustine for these counts, it appears the jury followed this admonition.

Finally, Augustine contends he was prejudiced because the employee who testified about the December 30, 2015 robbery testified that *Augustine* was another of the robbers who hit him in the back of the head, when Augustine was not even charged with that offense. He suggests this identification very likely led the jury to think Augustine did participate in that robbery and thus was getting a "free ride" when he should have been charged with the offense. Obviously, the trial court could not have anticipated this testimony by the employee; in this situation reversal would only be required "if the 'defendant shows that joinder actually resulted in "gross unfairness" amounting to a denial of due process.'" (*Gomez, supra*, 6 Cal.5th at p. 274.) This standard has not been met. Notably, Augustine's counsel did not move for a mistrial or ask for any instruction to be given to the jury when the issue of the witness's misidentification was raised

with the court, and Augustine's counsel did not argue that Augustine was prejudiced by the testimony.

In sum, the trial court did not abuse its discretion in denying Floyd's and Augustine's motions for severance.

III. *The Court Did Not Abuse Its Discretion By Denying Floyd's Request To Disclose Juror Information*

Floyd contends the trial court erred in denying his post-verdict petition for an order disclosing juror information. We conclude otherwise.

"Following the recording of a jury's verdict in a criminal trial, the trial court must seal the record of 'personal juror identifying information,' including 'names, addresses, and telephone numbers.' (Code Civ. Proc., § 237, subd. (a)(2).) 'Any person may petition the court for access to these records' upon a 'prima facie showing of good cause for the release of the' juror information. (*Id.*, subd. (b).) This showing must "'support a reasonable belief that jury misconduct occurred, that diligent efforts were made to contact the jurors through other means, and that further investigation is necessary to provide the court with adequate information to rule on a motion for new trial.'" [Citation.] 'Good cause does not exist where the allegations of jury misconduct are speculative, conclusory, vague, or unsupported.' [Citation.] "'Absent a satisfactory, preliminary showing of possible juror misconduct, the strong public interests in the integrity of our jury system and a juror's right to privacy outweigh the countervailing public interest served by disclosure of the juror information.'" [Citation.] We review a trial court's denial of a petition for the release of juror information for abuse of discretion." (*People v. Munoz* (2019) 31 Cal.App.5th 143, 165; see *Townsel v. Superior Court* (1999) 20 Cal.4th 1084, 1087;

People v. McNally (2015) 236 Cal.App.4th 1419, 1430; *People v. Cook* (2015) 236 Cal.App.4th 341, 346.)

Floyd filed a post-verdict petition for access to the jurors' personal identification information in order to prepare a motion for new trial. Floyd's attorney submitted a declaration stating his belief that the jury's verdict "was the result of jurors voting by lot in light of the numerous charges of which [Floyd] was accused." The declaration noted the jury deliberated over four days and submitted several questions over the course of those deliberations "indicating that it had done all it could do. The deliberation time frame as well as the question submitted, caused me to reasonably believe that jurors voted by lot on certain counts rather than according to the evidence or that other misconduct occurred. . . . I further believe that each juror was not completely comfortable with each verdict that was rendered. This belief is based on my observation of certain juror's [*sic*] non-verbal responses and subtle reactions when the verdicts were being read." A draft letter to jurors was attached to the motion.

The trial court denied the motion, finding Floyd had not made a showing of good cause for disclosure of the jurors' information. The court found Floyd's asserted bases for requesting disclosure amounted to speculation only. The court stated that the jury's lengthy deliberations merely indicated that they "were very thorough." Further, the court stated it had "watched the jurors very carefully" while the jurors were being individually polled and "saw nothing in the body language of the jurors that would indicate . . . that somebody was reluctant or hesitant or didn't agree with the verdict."[6]

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[6] The court further found "a great potential for danger to these jurors physical and otherwise" from disclosure of their

The court did not abuse its discretion in denying Floyd's motion for disclosure. His counsel's declaration did not make an adequate preliminary showing of possible juror misconduct; rather, his counsel engaged in unsupported speculation that the jurors improperly arrived at their verdicts or were uncomfortable with their verdicts as to particular counts. Based on its own observations of each juror, the trial court concluded Floyd's counsel did not have a reasonable belief that any juror had exhibited signs of being uncomfortable with his or her verdicts. The motion for disclosure of personal juror information was properly denied.[7]

IV. *The Trial Court's Failure to State Reasons for Imposing Consecutive Sentences for Augustine's Counts Was Harmless*

Augustine contends the trial court erred by failing to state reasons for imposing consecutive rather than concurrent sentences. Any such error was harmless.

At the sentencing hearing, counsel for Augustine asked the court to impose the middle term and concurrent sentences for Augustine's offenses, while the prosecution requested the court

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personal information, given that the case involved violence by multiple perpetrators, some of whom might still be unknown. (See Code Civ. Proc., § 237, subd. (b) [a court "shall not" set for hearing a motion for disclosure of juror information "if there is a showing on the record of facts that establish a compelling interest against disclosure . . . includ[ing] . . . protecting jurors from threats or danger of physical harm"].)

[7] Because Floyd did not demonstrate good cause for disclosure of the jurors' information, the court was not obliged to send his counsel's proposed letter to the jurors. (*People v. Jefflo* (1998) 63 Cal.App.4th 1314, 1322-1323.)

sentence him to the upper term and run the sentences consecutively. The court noted it had read and considered the probation report. The court found Augustine had committed a series of robberies that involved careful coordination, planning and sophistication. Further, Augustine had a persistent, escalating criminal record and committed robberies with a co-conspirator who used a gun in similar offenses that did not involve Augustine. Augustine had also not done well on probation in the past. The court found that "the factors in [Augustine's] favor are far outweighed by the aggravating circumstances so I am going to sentence him to the high term and I do agree with the People on that."[8] The court then pronounced that the sentences "will all be consecutive to each other." The court thus imposed the maximum sentence requested by the prosecution.

The trial court has "broad discretion . . . in choosing whether to impose concurrent or consecutive terms." (*People v. Monge* (1997) 16 Cal.4th 826, 850-851; see *People v. Clancey* (2013) 56 Cal.4th 562, 579.) "A trial court is required to state its reasons for imposing consecutive sentences." (*People v. Sperling* (2017) 12 Cal.App.5th 1094, 1103; see Cal. Rules of Court, rule 4.406(b)(5).) California Rules of Court, rule 4.425 sets forth specific criteria affecting the decision, including the presence of any circumstances in aggravation or mitigation.

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[8] The probation report listed a number of aggravating circumstances and no circumstances of mitigation. Besides the factors explicitly referred to by the court, the report listed additional circumstances in aggravation, including that Augustine's crimes involved great violence and the threat of great bodily harm and that Augustine had served a prior prison term.

Here the trial court erred in not stating reasons for imposing consecutive sentences, but Augustine did not make this objection at sentencing. Even assuming Augustine did not forfeit his claim of error, however, we need not remand the case for resentencing because the error was harmless. (*People v. McLeod* (1989) 210 Cal.App.3d 585, 590 ["a failure to state reasons is not prejudicial error per se: If the error is harmless the matter need not be remanded for resentencing"]; *People v. Avalos* (1984) 37 Cal.3d 216, 233 ["[i]n order to determine whether error by the trial court [in making a sentencing choice] requires remanding for resentencing 'the reviewing court must determine if "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of error"'"].)

Although the trial court was precluded from using the same facts to impose the upper term for the base count and to impose consecutive sentences (see Cal. Rules of Court, rule 4.425(b)(1)), only a single aggravating factor is required to impose an upper term (*People v. Ortiz* (2012) 208 Cal.App.4th 1354, 1374), and similarly, "[o]nly one criterion or factor in aggravation is necessary to support a consecutive sentence." (*People v. Davis* (1995) 10 Cal.4th 463, 552; see *People v. King* (2010) 183 Cal.App.4th 1281, 1323.) In light of the multiple factors cited by the court and its comments during sentencing, it is not reasonably probable it would have imposed concurrent terms had defense counsel timely and specifically objected to the court's failure to state reasons for imposing a consecutive sentence. (See *People v. Champion* (1995) 9 Cal.4th 879, 934, overruled on other grounds in *People v. Combs* (2004) 34 Cal.4th 821, 860 [where probation report noted 10 circumstances in aggravation and no circumstances in mitigation, "[i]t is inconceivable that the trial

court would impose a different sentence if we were to remand for resentencing. Accordingly, we find the trial court's failure to state reasons for imposing consecutive sentences to be harmless"]; *People v. Sperling, supra,* 12 Cal.App.5th at p. 1105 ["[i]n view of these aggravating factors and the probation officer's recommendation that appellant receive the 10-year maximum sentence, it is not reasonably probable that the trial court would have imposed concurrent instead of consecutive terms"]; *People v. Coelho* (2001) 89 Cal.App.4th 861, 889 ["[w]here sentencing error involves the failure to state reasons for . . . the imposition of consecutive terms, reviewing courts have consistently declined to remand cases where doing so would be an idle act that exalts form over substance because it is not reasonably probable the court would impose a different sentence"].)

V. *The Court Did Not Abuse Its Discretion By Declining To Strike Floyd's Prior Convictions*

Floyd asserts the trial court erred by declining to strike his prior strike convictions, including his 2007 conviction for attempted robbery and his 2010 conviction for first degree burglary. Floyd contends that in so ruling, the trial court failed to acknowledge Floyd's serious mental health problems that his counsel argued were a mitigating factor; and given his mental health history, "[n]o reasonable person could agree with the court's refusal to strike the priors."

A trial court may exercise its discretion to strike a prior conviction in furtherance of justice. (§ 1385, subd. (a); *Romero, supra*, 13 Cal.4th at pp. 529-530; *People v. Williams* (1998) 17 Cal.4th 148, 151-152.) "[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law . . . or in reviewing such a

ruling, the court . . . must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the [Three Strikes] scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*Williams*, at p. 161; see *People v. Carmony* (2004) 33 Cal.4th 367, 377 (*Carmony*).)

A trial court is not required to articulate its reasons for declining to strike a prior conviction. (*In re Large* (2007) 41 Cal.4th 538, 550; see *Carmony, supra*, 33 Cal.4th at p. 376.) "'The absence of such a requirement merely reflects the legislative presumption that a court acts properly whenever it sentences a defendant in accordance with the three strikes law.' [Citation.] 'Thus, the three strikes law not only establishes a sentencing norm, it carefully circumscribes the trial court's power to depart from this norm and requires the court to explicitly justify its decision to do so. In doing so, the law creates a strong presumption that any sentence that conforms to these sentencing norms is both rational and proper.'" (*In re Large*, at p. 550.) We review the trial court's ruling for an abuse of discretion. (*Carmony*, at p. 374.)

Floyd argued in his *Romero* motion that he had been suffering from a mental disorder since his late childhood, when he began to hear voices, and more recently he had been diagnosed with bipolar schizophrenic mood disorder. Floyd contended this mental condition affected his judgment and behavior and thus should be considered in determining whether to strike his prior

convictions. He further argued the prior strike offenses were remote and did not involve violent criminal conduct.

The court declined to strike the prior convictions after "balancing the facts." It noted "the defendant's long record, going back to when he was a teen." The court found the seriousness of Floyd's criminal behavior was "escalating over time as he gets older involving weapons and other crimes involving violence." Further, the court found "notwithstanding the age of some of the priors, the defendant has not spent a lot of time successfully out of custody."

We presume that in "balancing the facts," the trial court engaged in the requisite consideration of Floyd's "background, character, and prospects" (*People v. Williams, supra*, 17 Cal.4th at p. 161), including his mental health history. There is no requirement that the trial court specifically address each of the factors it considers before denying a *Romero* motion. Nor does Floyd's mental health history compel the finding that he fell outside the spirit of the three strikes sentencing scheme. Here, the trial court articulated rational grounds for declining to strike Floyd's prior convictions, and we find no abuse of discretion in its decisionmaking.

VI. *Floyd Has Not Shown the Trial Court Was Unaware It Had Discretion To Impose Concurrent Sentences for the Multiple Robberies Committed on the Same Occasion*

Floyd contends his case should be remanded for resentencing because the trial court was unaware it had discretion to impose concurrent rather than consecutive sentences for multiple robbery offenses committed on the same occasion but involving different victims. The trial court had

discretion under the three strikes law, specifically section 667, subdivisions (c)(6) and (c)(7), and section 1170.12, subdivisions (a)(6) and (a)(7), to impose concurrent sentences for those counts that arose from the same set of operative facts or were committed on the same occasion.[9] Floyd suggests the court

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[9] The California Supreme Court has interpreted section 667, subdivisions (c)(6) and (c)(7), and former section 1170.12, subdivisions (a)(6) and (a)(7) (Stats.1994, c. 12 (A.B. 971), § 1, eff. March 7, 1994), to provide that "'consecutive sentences are not mandatory [under the three strikes law] if the multiple current felony convictions are "committed on the same occasion" or "aris[e] from the same set of operative facts."'" (*People v. Deloza* (1998) 18 Cal.4th 585, 591; see *People v. Lawrence* (2000) 24 Cal.4th 219, 233 ["where a sentencing court determines that two or more current felony convictions were either 'committed on the same occasion' or 'aris[e] from the same set of operative facts' . . . consecutive sentencing is not required under the three strikes law, but is permissible in the trial court's sound discretion"]; *People v. Hendrix* (1997) 16 Cal.4th 508, 512-513 (*Hendrix*) [holding consecutive sentences are not mandatory under the three strikes law when the defendant has two or more strikes and commits serious or violent felonies against multiple victims at the same time].) Although section 1170.12, subdivision (a)(7) was amended in 2012 as part of Proposition 36 (Three Strikes Reform Act, § 2, as approved by voters, Gen. Elec. (Nov. 6, 2012)), the only published decision to address that amendment concludes that trial courts retain discretion to impose concurrent sentences in this scenario. (See *People v. Torres* (2018) 23 Cal.App.5th 185, 197, 201-202 ["the change Proposition 36 made to section 1170, subdivision (a)(7) does not, in large measure, alter the Three Strikes sentencing principles the Supreme Court set forth in *Hendrix*"]; but see Couzens & Bigelow, Cal. Three Strikes Sentencing (The Rutter Group Aug. 2018 Update), § 8:1 [The amendment to section 1170.12, subd. (a)(7) "now requires the

should have exercised such discretion in sentencing him on counts 3 and 4 (January 19, 2016 robberies); counts 6, 7 and 8 (December 17, 2015 robberies); counts 9 and 10 (February 2, 2016 attempted robberies); counts 11 and 12 (December 19, 2015 robberies); and counts 17 and 18 (December 30, 2015 robberies).[10]

"'[W]hen the record shows that the trial court proceeded with sentencing on the . . . assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing. [Citations.] Defendants are entitled to "sentencing decisions made in the exercise of the 'informed discretion' of the sentencing court," and a court that is unaware of its discretionary authority cannot exercise its informed discretion.'" (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425; see *People v. Koback* (2019) 36 Cal.App.5th 912, 928 ["'when the

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court to sentence multiple current serious or violent felonies consecutively, whether or not they occurred on the same occasion or out of the same set of operative facts"].) We find the logic of *People v. Torres* to be persuasive and hold the same.

[10] Floyd was found guilty of committing robberies or attempted robberies on six different dates. The trial court has no discretion to impose concurrent sentences for robberies committed on different occasions. (§ 667, subd. (c)(6) ["If there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts, the court shall sentence the defendant consecutively on each count"]; § 1170.12, subd. (a)(6) [same].) Therefore, even if the court had exercised its discretion to impose concurrent sentences for offenses occurring at the same time, Floyd would still have been sentenced to *no fewer than six consecutive sentences of 25 years to life*.

record indicates the court misunderstood or was unaware of the scope of its discretionary powers, we should remand to allow the court to properly exercise its discretion'"]; *People v. Leon* (2016) 243 Cal.App.4th 1003, 1026 ["Relief from a trial court's misunderstanding of its sentencing discretion is available on direct appeal when such misapprehension is affirmatively demonstrated by the record"]; see, e.g., *People v. Rodriguez* (2005) 130 Cal.App.4th 1257, 1261, 1263 [judgment reversed and remanded for resentencing where trial court's statements demonstrated it mistakenly believed it lacked discretion to impose concurrent sentences under the one strike law].)

However, ""'it is defendant's burden on appeal to affirmatively demonstrate error—it will not be presumed.'"" (*People v. Sullivan* (2007) 151 Cal.App.4th 524, 549 (*Sullivan*).) "It is a basic presumption indulged in by reviewing courts that the trial court is presumed to have known and applied the correct statutory and case law in the exercise of its official duties." (*People v. Mack* (1986) 178 Cal.App.3d 1026, 1032 [absent evidence to the contrary, appellate court presumed trial court knew the scope of its discretion to strike a sentencing enhancement and decided not to exercise such discretion in defendant's favor].) In particular, "[w]e presume the court lawfully performed its duty in imposing sentence." (*People v. Burnett* (2004) 116 Cal.App.4th 257, 261.)

While Floyd's sentencing memorandum argued that the trial court had discretion to impose concurrent sentences, the prosecution's sentencing memorandum incorrectly asserted that under section 1170.12, subdivision (a)(7), the court was required to impose consecutive sentences for all 12 counts. Although the prosecution was mistaken, that does not mean the trial court

accepted its arguments as correct or shared its point of view. Floyd has not pointed to anything in the record that supports his contention that the trial court was unaware it had discretion to impose concurrent sentences for multiple counts arising out of the same event. In sentencing Floyd, the court simply stated: "Each count is under the Third [sic] Strikes law, and each count will be consecutive to all other counts and that goes for the enhancements [also]."[11] Because Floyd has not affirmatively demonstrated that the trial court was unaware of its discretion to impose concurrent sentences, we presume the court properly exercised its discretion and find no error.

VII. *Floyd's Sentence Was Not Cruel or Unusual Punishment*

Floyd contends that his sentence of 447 years to life "for a series of robberies in which no one was hurt, by a man suffering from mental illness" violates the Eighth Amendment and the

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[11] Unlike Augustine, Floyd has not argued that remand is necessary due to the trial court's failure to comply with its obligation to state its reasons for imposing consecutive sentences. Floyd has forfeited any contention that the court erred on that basis. In any event, Floyd could not demonstrate it is reasonably probable that absent the error the result would have been different, given the trial court's stated reasoning in declining to strike Floyd's prior strike convictions and the probation report's inclusion of a number of circumstances in aggravation and *no* circumstances in mitigation. (See *People v. Smith* (1984) 155 Cal.App.3d 539, 546 ["because adequate reasons for imposing full consecutive sentences . . . existed in abundance, the error in failing to state those reasons does not require a remand for resentencing"].)

California Constitution's prohibition against cruel or unusual punishment. We reject his claim.

The Eighth Amendment forbids punishment that is grossly disproportionate to the offense. (*Graham v. Florida* (2010) 560 U.S. 48, 59 [130 S.Ct. 2011, 176 L.Ed.2d 825]; *Ewing v. California* (2003) 538 U.S. 11, 23 [123 S.Ct. 1179, 155 L.Ed.2d 108] (*Ewing*).) The California Constitution prohibits punishment so disproportionate to the crime for which it was imposed that it "shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424, superseded by statute on another ground as stated in *People v. West* (1999) 70 Cal.App.4th 248, 257.) "Successful challenges" to a sentence as cruel or unusual punishment under either the federal or state Constitutions are "exceedingly rare." (*Ewing,* at pp. 20-21 [sentence of 25 years to life for felony theft of golf clubs under California's three strikes law, with prior felonies of robbery and burglary, did not violate federal prohibition on cruel and unusual punishment]; see *People v. Perez* (2013) 214 Cal.App.4th 49, 60 [successful challenges under California's prohibition of cruel or unusual punishment are "extremely rare"].)

Floyd's sentence of 447 years to life is the practical equivalent of a sentence of life in prison without the possibility of parole, which in appropriate cases has been found not to violate the prohibition against cruel or unusual punishment either in the federal or state Constitutions. (See *Sullivan, supra,* 151 Cal.App.4th at p. 573 [noting 210-year to life sentence was equivalent to a sentence of life in prison with no possibility of parole and did not constitute cruel or unusual punishment]; *People v. Byrd* (2001) 89 Cal.App.4th 1373, 1383 ["In practical effect, [defendant sentenced to 115 years plus 444 years to life] is

in no different position than a defendant who has received a sentence of life without possibility of parole: he will be in prison all his life"; sentence found not to be cruel or unusual].)

"[I]n determining the gravity of [a defendant's] conduct in evaluating an Eighth Amendment challenge to a sentence imposed under a recidivist sentencing statute, we must consider not only [the] triggering offense but also the nature and extent of [the defendant's] criminal history." (*In re Coley* (2012) 55 Cal.4th 524, 562.) "[W]e must place on the scales not only his current felon[ies], but also his long history of felony recidivism . . . . In imposing a three strikes sentence, the State's interest is not merely punishing the offense of conviction, or the 'triggering' offense: '[I]t is in addition the interest . . . in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law.'" (*Ewing, supra,* 538 U.S. at p. 29.)

We begin with the 12 counts of robbery and attempted robbery of which Floyd was convicted. In *Sullivan*, the court found that the "[c]ommission of a series of robberies which included threatened acts of violence with a deadly weapon must be considered acts of a most heinous nature," particularly when the defendant committed the robbery offenses "one after another unabated until he was captured after the [final] robbery." (*Sullivan, supra*, 151 Cal.App.4th at p. 570.) Similarly here, Floyd terrorized employees at nine different stores over a two-and-a-half-month period. Sometimes he was armed; sometimes he used threats to kill; and other times he used physical violence against the store employees. He only stopped because he was caught in the act. The fact no one was hurt does

not diminish the seriousness of the offenses. Further, Floyd's lengthy criminal history of felony offenses, including serious felonies, resulting in four terms in state prison, leads to the conclusion he is "an incorrigible recidivist offender who presents a most grave and extreme level of danger to society." (*Ibid.*)

Floyd contends it is cruel or unusual to impose such a lengthy sentence upon a person who is mentally ill, but the California Supreme Court has held that even sentencing certain mentally ill defendants to death does not violate the federal or state prohibitions on cruel or unusual punishment. (See *People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1252, disapproved on another ground in *People v. Rangel* (2016) 62 Cal.4th 1192; *People v. Castaneda* (2011) 51 Cal.4th 1292, 1345.) Thus, we cannot say that the lesser sentence here is unconstitutional.

Although Floyd objects that his sentence is "greater than for murder," "'[t]he commission of a single act of murder, while heinous and severely punished, cannot be compared with the commission of multiple felonies.'" (*Sullivan, supra*, 151 Cal.App.4th at p. 572.) Moreover, "a comparison of [Floyd's] 'punishment for his current crimes with the punishment for other crimes in California is inapposite since it is his recidivism in combination with his current crimes that places him under the three strikes law.'" (*Id.* at p. 571, quoting *People v. Ayon* (1996) 46 Cal.App.4th 385, 400, disapproved on another ground in *People v. Deloza, supra,* 18 Cal.4th at p. 600 fn. 10.) Floyd's sentence "is not out of all proportion to the punishment in California for commission of multiple, serious robbery offenses by a recidivist offender." (*Sullivan*, at p. 572.) His sentence does not constitute cruel or unusual punishment.

VIII. *A Limited Remand Is Required for the Trial Court To Consider Whether To Strike the Section 667, Subdivision (a), Enhancements*

At the time Floyd was sentenced, the court had no discretion to forego imposition of section 667, subdivision (a), enhancements for qualifying prior serious felony convictions. In 2018 the Governor signed into law Senate Bill No. 1393, which, effective January 1, 2019, allows the trial court to exercise discretion to strike or dismiss section 667, subdivision (a), serious felony enhancements "in the furtherance of justice." (See Stats. 2018, ch. 1013, §§ 1 & 2.) Senate Bill No. 1393 applies retroactively to Floyd because his sentence was not final before January 1, 2019. (*People v. Jones* (2019) 32 Cal.App.5th 267, 272 [S.B. No. 1393 applies retroactively]; see *In re Estrada* (1965) 63 Cal.2d 740, 744-745 [absent contrary legislative intent, "[i]f the amendatory statute lessening punishment becomes effective prior to the date the judgment of conviction becomes final then, in our opinion, it, and not the old statute in effect when the prohibited act was committed, applies"].) As the Attorney General concedes, remand is required for the trial court to exercise its discretion whether to impose or strike the prior serious felony enhancements.

IX. *There Was No Cumulative Error*

Floyd argues the cumulative effect of the trial court's errors compels reversal. Because the trial court did not err, however, there is no cumulative error. (See *People v. Covarrubias* (2016) 1 Cal.5th 838, 910 ["[b]ecause defendant has failed to demonstrate any error, there is no prejudicial cumulative effect"].)

DISPOSITION

Augustine's convictions are affirmed. Floyd's convictions are also affirmed, but we remand for the trial court to exercise its discretion whether to impose or strike the prior serious felony enhancements pursuant to section 667, subdivision (a). Following Floyd's resentencing, the trial court is directed to prepare a corrected abstract of judgment and to forward it to the Department of Corrections and Rehabilitation.

STONE, J.*

We concur:

PERLUSS, P. J.

FEUER, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.